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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DANNY SCOTT,

Defendant and Appellant.

C084439

(Super. Ct. No. CM043699)

Defendant Michael Danny Scott appeals a judgment entered after a jury found him guilty of two counts of cruelty to animals (Pen. Code, § 597, subd. (a)) and found true the special enhancement allegation that he used a deadly weapon in the commission of those offenses (Pen. Code, § 12022, subd. (b)(1)). Specifically, defendant killed his brother's Jack Russell Terrier (Roxy) and shot a neighbor's cat (Sophie Rose), both with an air rifle later seized by authorities.

Defendant argues that the trial court erred in admitting uncharged bad act evidence on the grounds that (1) insufficient evidence established that he committed the underlying

acts of shooting his own dogs and several neighborhood cats; (2) admission of the bad act evidence violated Evidence Code section 1101, subdivision (a);¹ and (3) assuming admissibility under section 1101, subdivision (b), the evidence should have been excluded as unduly prejudicial under section 352. He argues these errors violated his constitutional due process rights, requiring reversal.

Finding no abuse of discretion, we affirm.

BACKGROUND

A. *The People's Case-in-Chief*

1. Evidence Concerning the Charged Offenses

a. Testimony of defendant's brother

Defendant's brother R. Scott testified to living next to defendant in the Thermalito area of Oroville. In the summer of 2015, R. owned four dogs and two cats. One of the dogs, a Jack Russell Terrier named Roxy, belonged to R.'s nine-year-old daughter, who then considered defendant to be her favorite uncle. Roxy knew defendant well and she trusted him.

Before their relationship fractured, defendant showed R. a picture of a cat and asked him whether it belonged to R.'s daughter. R. told him it did not, and defendant remarked, "Good, because I shot it." R. recognized the cat and told defendant it belonged to a neighbor's daughter. Defendant owned an air rifle and told R. that he had shot the cat and some birds out of a neighbor's tree.

R. further testified about his dispute with defendant, which occurred after R. tried to help defendant's then-girlfriend repair a slashed car tire in the midst of a fight she was having with defendant. In response to R.'s attempt to help the girlfriend, defendant entered R.'s house and threatened his family, scaring his kids and wife "to death." R. and

¹ Undesignated statutory references are to the Evidence Code.

defendant have not spoken since that incident. R.'s daughter also stopped speaking with defendant as a result of defendant's threatening behavior. R.'s children and wife still have nightmares arising from defendant's actions. Because of the falling out, defendant and R.'s family were not on good terms in September 2015.

b. The neighbor's testimony about Sophie Rose

Amber S. testified to living in Thermalito with her two children, fiancé Caleb L., and their three dogs and two cats. One of those cats, Sophie Rose, was pictured in People's exhibit 2. Amber lived across the street from R. and defendant, but had no relationship with defendant. Caleb had, however, yelled at defendant one night in the summer of 2015 after he and Amber heard what sounded like a bullet ricocheting off their fence around 11:00 p.m. Defendant, who was in his front yard, apologized.

In September 2015, the family could not find their cat Sophie Rose, which was unusual. The next day, Amber found the cat hiding under her car. Sophie Rose had blood dripping from her right side and was uncharacteristically skittish, refusing to come out. After getting the cat out from under the car, the family took her into the house and cleaned her up. The wound looked like "a tiny poke," so even though the cat limped for a few days, they did not initially take her to the vet. Amber eventually took Sophie Rose to the vet in October at the request of Butte County Animal Control Officer Debra Trew.

c. Testimony of defendant's sister-in-law

R.'s wife, T. Scott, testified that the family gave her eldest daughter Roxy, a Jack Russell Terrier, for her fifth birthday following chemotherapy treatments she had received for kidney cancer and in anticipation of the birth of their next child. In September 2015, Roxy was approximately four and a half years old and weighed about 15 pounds. On September 30, 2015, T. returned from work and let in her dogs, but Roxy was not among them. T. assumed Roxy was already with her daughter, but the following morning, Roxy (who slept with that daughter) was not in her daughter's bed and could not be found anywhere.

On October 1, 2015, T. received a social media message from defendant's girlfriend, Courtney N. After reviewing the message, T. contacted R., and together they went to animal control. T. also discovered a fresh puddle of blood in their carport.

d. Testimony of defendant's girlfriend

Courtney N. dated and lived with defendant from July to September 2015. On September 30, 2015, she was at defendant's house trimming marijuana with defendant's friend Justin S. While she was outside, Roxy and a Chihuahua from R.'s house came through a hole in the fence and were barking and running around the yard. Defendant told Courtney to go inside and get his BB gun. He then instructed her to fire at the dogs to scare them away. Courtney aimed at Roxy's feet and a rock near the dog. The dog did not make any noise in reaction to the shot; "[i]t was running around, still wagging its tail, barking." Defendant told Courtney "to go inside, that the dog was dying and it had internal bleeding." Courtney told defendant that she had not shot the dog and confirmed the dog was fine by inspecting it. Defendant reiterated that the dog had internal bleeding, and he was going to kill it. Courtney protested that there was no need to kill the dog and went inside the house. Notably, Courtney believed defendant's statements to be a pretext for killing Roxy because "he already told [her] prior to this that he was going to kill their dogs. . . . A month before, when him and his brother got in a fight, he told [her] he was killing their dogs."

From a window inside the house, Courtney saw defendant chasing the dog around a fenced-in area of the backyard shooting at it. Defendant cornered the dog, who tried to hide behind a big rock, and he shot it four or five times. The dog was yelping and bleeding into the grass and on the rock. Courtney testified that she thought defendant was trying to shoot the dog behind the ear, but he kept hitting other places, such as the stomach, lower face, and neck. The dog tried to get away, running to the corner of the house, and defendant kept shooting. Defendant repeatedly pumped the gun and shot the

dog in the back of the head approximately five or six times. Defendant remarked that Roxy “had a body of steel” and that it “was a tough son of a bitch.”

Roxy escaped from the yard when Justin opened the gate. Defendant “freaked out,” worried that T. would return home for lunch. Justin kept watch for T. while defendant looked for the dog, finding it on the porch. Defendant put the dog in a five-gallon bucket and threw it back over the fence. Roxy yelped loudly and ran into the garage. Justin tried to corner the dog, and Roxy bit him. Roxy was scared, shaking, and yelping. Courtney could hear defendant shooting the dog in the corner of the garage next to the kitchen. Courtney estimated that she saw defendant shoot Roxy a total of 15 to 20 times, and heard him shoot another five to eight times.

Once the dog died, defendant brought her into the kitchen in a “weed tote.” He made a joke about the dog’s death and then took it to the river to sink it. After defendant left, Courtney fled out of fear. When defendant realized Courtney was gone, he texted her to say that he was going to tell R. and T. that she had killed Roxy. Courtney did not respond, but did reach out to T. on social media. Courtney never spoke with defendant again.

e. Testimony of law enforcement personnel

Animal Control Officer Debra Trew testified regarding her investigation of Roxy’s death, first speaking with Courtney, who was distraught and worried about possible retaliation. Officer Trew also spoke with R. and T. She further investigated the possible shooting of a cat named Sophie Rose, requesting an X-ray that revealed a pellet lodged under her skin near her ribs.

Officer Trew participated in a search of defendant’s residence wherein an air rifle was seized. The pellets seized were .177-caliber, the same caliber as the pellet from

Sophie Rose.² A pellet was removed from the wall of the garage where Courtney said Roxy had been cornered. The muzzle of the rifle had dog bite marks on it. Officer Trew directed deputies to collect evidence from the garage, back corner of the yard, the east side of the yard, and the carport, consistent with Courtney's description of the events of September 30, 2015.

Towards the end of the search, Officer Trew spoke with defendant, who expressed disbelief "that they knocked his F-ing door in because of a dog," "that his brother would be disowned," and that it "basically came down to a family feud." Officer Trew also interviewed Justin to follow up on Courtney's report that he had been bitten by Roxy. Officer Trew observed a bite mark, consistent with a bite from a small dog. Justin refused to provide a statement about what happened to Roxy.

Detective Jay Freeman of the Butte County Sheriff's Office helped animal control execute the search warrant at defendant's home and documented all evidence seized. Detective Freeman brought the seized pellet gun and a can of pellets to court. Detective Freeman also helped animal control collect biological material from a bloodstain in the neighboring carport on December 2, 2015.³

Detective Jason Miller helped search defendant's home and was assigned to assist with processing the scene, including collecting swabs of blood and a pellet from the garage wall. He recalled taking swabs from inside the garage, the barrel of the pellet gun, a rock in the backyard, and the carport next door.

Dr. Robert Grahm testified to his forensic and genetic analysis of the collected evidence. Using DNA comparison, Dr. Grahm determined that blood samples from the rock, carport, and a pole saw were all from the same female dog.

² The examining veterinarian, Dr. Paul Dent, confirmed the caliber pellet used to shoot Sophie Rose was .177.

³ This collection was necessitated by a problem with the initial swab.

Supervising Investigative Lieutenant Jason Wines of the Butte County District Attorney's Office testified about the capabilities of air rifles, including the velocity at which differing weights of pellets would need to travel to penetrate the chest cavity and the eye. It was Lieutenant Wines's opinion that defendant's rifle would be a dangerous or deadly weapon if used against a small dog or a house cat. The weapon only allowed a single shot, but someone familiar with it could reload it in five to seven seconds. Based upon defendant's size, Lieutenant Wines did not think he would have difficulty reloading the rifle.

2. Evidence Concerning Uncharged Prior Bad Acts by Defendant

a. Cat shootings

Cari E. testified to living in the Thermalito area with her husband, daughter, dogs, and cats. On September 13, 2015, at approximately 10:00 a.m., her daughter noticed their kitten, who was approximately five months old, laying in the grass of their front yard. He did not respond to her calls, and when the daughter picked him up, she noticed he had a wound. He was lethargic, and when Cari handled him she felt what she thought was a BB in his side. She took him to the vet, who confirmed via X-ray the presence of a metal projectile. The cat had to be euthanized.

Wendy P. testified to living in Thermalito with her husband, two children, dogs, and a cat. In September 2015, Wendy noticed her cat looked sick. She examined her, finding blood and a hole in her stomach. She took the cat to the vet, who told her that the cat had been shot with a small pellet or bullet and likely was too weak to survive surgery, so she euthanized her.

Ann Marie V. testified to living in Thermalito with her boyfriend, two children, and various pets. In early September 2015, she found one of her cats dead in the front yard; it had been shot and had a hole in his neck. Later in September, another of her cats was wounded in the leg, and her boyfriend removed a pellet.

Mai T. testified to living with her senior parents, siblings, and pets at her home in Thermalito. On September 24, 2015, one of her siblings contacted her because her cat's eye was bleeding. She took the cat to the vet and discovered it had been shot with a pellet.

Officer Trew testified to receiving an unusual number of reports of cat shootings during September 2015, including calls from Cari, Wendy, Ann Marie, and Mai. She mapped the addresses of these shootings, and they all occurred within "a very small area," estimated to be about two square miles in Thermalito. Her department had no further reports of cat shootings following the seizure of defendant's air rifle on October 8, 2015.

b. Dog shootings

Defendant's former girlfriend Courtney testified to living with defendant and helping him tend to the marijuana garden in his backyard. Defendant had another property on which he also cultivated marijuana and kept dogs. Defendant told her that "at the end of every grow season that his pit bull, after they're done, they've served their purpose, and he [pats] them on the head and tells them they did a good job and shoots them behind the ear. And he gets new dogs at the next year." Approximately two weeks after telling Courtney about shooting his guard dogs, defendant disguised himself, got on an all-terrain vehicle, and took a handgun from the house.

B. *The Defense*

Defendant called Justin, who testified he was at defendant's house trimming marijuana in the garage on September 30, 2015. Later, when he was in the backyard smoking, he noticed two dogs barking at him, and one of them nipped his finger. He did not think much of it and returned to the garage to continue his work. Justin and Courtney spoke in the garage, and Justin learned the dogs were actually from next door. Justin testified that Courtney complained she was "sick and tired of those dogs" because they chased her. Courtney then got a pellet gun from the house and headed out to the

backyard. Justin heard a shot, and Courtney went into the house. Defendant then came out. This was the first time Justin had seen defendant that morning. Defendant checked on the dog and came back stating, “[S]he didn’t shoot it in the butt, like she said, she shot it dead square in the chest; it’s barely breathing.”

Justin testified that defendant got shoes from inside the house and when he came out, the dog was no longer in the backyard. Defendant was concerned his niece might find the dog, so they searched for it. Justin found the dog in the garage. It had “blood all over its chest” and was having difficulty breathing. Justin told defendant, “Dude, if this was my dog, I’d put it down right now. You can’t let this dog suffer.” Justin then left, having called his wife to come pick him up while they were searching for the dog. Justin never saw defendant with a gun or pellet gun and only heard one shot while he was there.

On cross-examination, Justin admitted he was a childhood friend of defendant, who pays him for helping him with his marijuana. He also admitted telling Officer Trew she was at the wrong address. While Officer Trew was there, she took pictures of the wound on his hand, which was over a week old. Justin denied reaching down, prodding, or trying to catch the dog.

Justin conceded he did not tell Officer Trew how he was bitten, that Courtney had shot Roxy, that he saw Roxy after the shooting, or that she had escaped. Justin stated, “No. I didn’t want nothing to do with any of this.” Justin was worried about getting in trouble. He testified that he did not see anyone shoot Roxy.

C. Rebuttal

Officer Trew retook the stand and testified further regarding her interview of Justin, who had initially told her “there was a dog down the street that we were probably looking for.” She told Justin she had information he had been bitten by a dog, and he offered his hand. Given the condition of the bite eight days later, she opined that initially there was likely a “considerable amount of bleeding.” Officer Trew described the wound, saying that the bite was still considerably red, despite being eight days old.

She continued that Justin told her the dog bite happened at defendant's home and came from a small dog that belonged to a neighbor. After she told him that she knew the dog had been shot and killed, Justin "became a lot more reserved." Justin denied knowing the location of the body. He refused to answer additional questions and "clearly became uncomfortable and did not want to speak any further about the incident."

D. *Verdict and Sentencing*

The jury found defendant guilty of two counts of animal cruelty and found true the special allegations that he had used a deadly weapon. The court denied defendant's request for probation and sentenced him to an aggregate prison term of six years four months, comprised of the upper term of three years for the first count of animal cruelty and one year for the associated enhancement, plus eight months for the second count of animal cruelty and eight months for the enhancement related to that count, plus an additional 16 months for other counts in case No. 16CF04307.⁴

DISCUSSION

Defendant's sole contention on appeal is that the trial court abused its discretion in admitting uncharged bad acts evidence concerning the shooting of his guard dogs and neighborhood cats. Defendant has not met his burden of showing that the trial court's decisions were arbitrary, capricious, or made in a patently absurd manner, so we will affirm.

A. *Applicable Law*

"As a general rule, evidence the defendant has committed crimes other than those for which he is on trial is inadmissible to prove bad character, predisposition to criminality, or the defendant's conduct on a specific occasion. [Citation.]" (*People v.*

⁴ Defendant earlier pled no contest in case No. 16CF04307 to failure to appear after posting bail (Pen. Code, § 1320.5) and preparing false documentary evidence (Pen. Code, § 134) for conduct stemming from his actions in this case.

Williams (2009) 170 Cal.App.4th 587, 607.) Under section 1101, subdivision (b), however, evidence that defendant committed a crime or other “bad act” is admissible “when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.” “The admissibility of such evidence turns largely on the question whether the uncharged acts are sufficiently similar to the charged offenses to support a reasonable inference of the material fact they are offered to prove. [Citations.]” (*People v. Erving* (1998) 63 Cal.App.4th 652, 659-660.)

“Although a person charged with [a] crime cannot be convicted thereof unless he is proved guilty beyond a reasonable doubt, other uncharged offenses introduced to show the existence of some element of the charged crime need only be proved by a preponderance of substantial evidence. [Citations.]” (*People v. Durham* (1969) 70 Cal.2d 171, 187, fn. 15.) “ ‘We review the trial court’s decision whether to admit evidence, including evidence of the commission of other crimes, for abuse of discretion.’ [Citation.]” (*People v. Leon* (2015) 61 Cal.4th 569, 597 (*Leon*).) In so doing, we review the evidence before the court at the time of its decision. (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 243 (*Hendrix*).)

“The conduct admitted under . . . section 1101[, subdivision] (b) need not have been prosecuted as a crime, nor is a conviction required. [Citations.] The conduct may also have occurred after the charged events, so long as the other requirements for admissibility are met. [Citation.] Specifically, the uncharged act must be relevant to prove a fact at issue ([§ 210]), and its admission must not be unduly prejudicial, confusing, or time consuming ([§ 352]).” (*Leon, supra*, 61 Cal.4th at pp. 597-598.)

Relevance of uncharged acts “depends, in part, on whether the act is sufficiently similar to the current charges to support a rational inference of intent, common design, identity, or other material fact. [Citation.] ‘The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.]

. . . In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant “ ‘probably harbor[ed] the same intent in each instance.’ ” [Citation.] Greater similarity is required to prove the existence of a common design or plan. In such a case, evidence of uncharged misconduct must demonstrate “not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.” [Citation.] [Citation.] To show a common design, ‘evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts.’ [Citation.] . . . These common features need not be unique or nearly unique; ‘features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.’ [Citation.]” (*Leon, supra*, 61 Cal.4th at p. 598.)

B. *The In Limine Proceedings*

Before trial, the People moved in limine for permission to present evidence of several uncharged acts that defendant allegedly perpetrated against other animals. Acts involving dogs were offered to show malice and the absence of mistake in the offense against Roxy. Those against cats were offered to show a common plan and identity in the offense against Sophie Rose. The acts identified in the motion were:

- 1) Defendant’s shooting of a stray dog with a .22-caliber gun for no apparent reason when he was a teenager.
- 2) Defendant’s alleged shooting of five cats within a mile of defendant’s home during the month of September 2015, which stopped after seizure of defendant’s rifle and his arrest.
- 3) Defendant’s shooting of pit bulls used to guard his marijuana crops at the end of the grow season.

Defendant filed a competing motion to exclude the evidence. The court deferred ruling on the motions until after jury selection, at which time it excluded the stray dog evidence because, while relevant, it was more than a decade old and the prejudicial effect of the evidence was outweighed by its probative value. The court allowed evidence concerning the shooting of neighborhood cats to show intent and common plan, as well as lack of accident or mistake, and ruled that the probative value of this evidence exceeded its prejudicial effect. Finally, the court deferred ruling on the admissibility of defendant's statement that he shot his pit bulls pending an evidentiary hearing under section 402.

At the section 402 hearing, Courtney testified to dating defendant from July to the end of September 2015 and to helping defendant cultivate marijuana in his backyard. Defendant had a small pit bull when she met him. Courtney also had a pit bull, but both her dog and the defendant's pit bull went missing about one month into their relationship. Defendant told her "his dog got [her] dog off of the chain in a double-fenced backyard and they both got out." Courtney testified at the hearing to her feeling that defendant was responsible for killing her dog, although she conceded she had no evidence of that.

Approximately three weeks after her dog went missing, defendant told her "he has pit bulls at his properties normally, and at the end of every grow that he would tell them they did their job and pat them on the head and shoot them behind the ear." Approximately two weeks after telling her this, she saw defendant disguise himself before taking his all-terrain vehicle to a field near his home to bury a pistol. Defendant told her "he buries his guns so he doesn't get in trouble."

Defendant argued the proffered testimony went only to propensity, and even if it was admissible regarding intent, its probative value was outweighed by prejudice given the differences between the prior act and the charged conduct. The trial court disagreed, ruling the testimony that defendant told Courtney he shot his dogs every year would be allowed "on the issue of mental state, plan or scheme, and absence of accident, or lack of

mistake” and that its probative value exceeded its prejudicial effect. Courtney would be admonished, however, not to mention her dog that went missing.

C. *Application*

1. Sufficient Evidence Established Defendant Committed the
Uncharged Acts

As noted above, in assessing the trial court’s decision to admit uncharged act evidence, we consider the facts known to the court at the time the ruling was made.

We find the People’s showing sufficient to support the trial court’s implied finding that there was sufficient evidence that the uncharged acts could be found true by a preponderance of the evidence.⁵ (See *People v. Lucas* (1995) 12 Cal.4th 415, 466 [on a section 402 motion, the “decision whether the foundational evidence is sufficiently substantial is a matter within the court’s discretion”]; *People v. Simon* (1986) 184 Cal.App.3d 125, 132-133 [the trial court, in making its preliminary fact determination for admission of uncharged acts, uses a preponderance of the evidence standard].)

As to the cat shootings, the People’s offer of proof was that testimony would establish that multiple individuals, all of whom lived within a mile of defendant’s home, owned cats that were shot in September 2015, and that the shootings stopped after the seizure of defendant’s air rifle and his arrest.⁶

⁵ We also note that the trial court properly instructed the jury that it was to consider that evidence only if it determined that defendant committed the underlying uncharged acts by a preponderance of the evidence. (See *Leon, supra*, 61 Cal.4th at p. 597 [jury properly instructed on preconditions of use].)

⁶ Further supporting that defendant committed these shootings, Courtney testified later at trial that the air rifle was full of pellets when defendant shot Roxy because “[h]e had been shooting the cats prior to this. [¶] . . . [¶] He filled this a week before, and he shot the neighbor’s cat.” Trial testimony further established that at least two of the cats in question were shot the week before Roxy’s shooting.

As to the dog shootings, at the section 402 hearing the People offered the testimony of defendant's girlfriend, Courtney. As noted above, she knew that defendant had at least one pit bull and that he told her that "he has pit bulls at his properties normally, and at the end of every grow that he would tell them they did their job and pat them on the head and shoot them behind the ear." Courtney helped defendant cultivate marijuana at the house where defendant's pit bull lived. A couple of weeks after defendant admitted shooting his dogs, Courtney saw defendant disguise himself and take his all-terrain vehicle somewhere to bury the gun "so he doesn't get in trouble." From this evidence, a jury could determine that it was more likely than not that defendant had shot the pit bulls.

We reject defendant's arguments that this evidence was inadmissible because it was not adequately proven. (See *Leon, supra*, 61 Cal.4th at p. 599 [rejecting similar argument]; *People v. Medina* (1995) 11 Cal.4th 694, 748 [aggregate of nondistinctive features sufficiently established defendant committed the uncharged bad acts].) Defendant's authorities discussing admissibility of uncharged acts evidence committed by third parties are inapposite and does not alter this result. (See, e.g., *People v. Jackson* (1967) 254 Cal.App.2d 655, 660 [conviction cannot rest on other crimes evidence of a third person because it "saddles a defendant with the burden of proving the innocence of another"]; accord, *People v. Long* (1970) 7 Cal.App.3d 586, 590-591.)

2. The Uncharged Bad Acts Were Relevant to Disputed Issues

We also find that the underlying uncharged bad acts were relevant to disputed issues. To be admissible, the uncharged acts must be relevant either to an ultimate fact or an intermediate fact from which an ultimate fact could be inferred. (*Hendrix, supra*, 214 Cal.App.4th at p. 239.) "Elements of the offense and defenses are ultimate facts. [Citation.]" (*Ibid.*) A lack of mistake, as well as whether defendant acted with a common plan, are intermediate facts. (*Ibid.*) Penal Code section 597, subdivision (a) provides: "[E]very person who maliciously and intentionally maims, mutilates, tortures,

or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of a crime”

Here, the trial court determined that the string of cat shootings occurring in defendant’s neighborhood in the month of September 2015, which stopped after the seizure of his pellet rifle and his arrest, were relevant to show defendant’s intent and a common plan. Whether defendant acted maliciously and intentionally when he shot and wounded Sophie Rose was at issue by virtue of defendant’s not guilty plea. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4. (*Ewoldt*) [“ ‘defendant’s plea [of not guilty] does put the elements of the crime in issue for the purpose of deciding admissibility of evidence [of uncharged misconduct], unless the defendant has taken some action to narrow the prosecution’s burden of proof’ ”].)

The other cat shootings, which were all very similar to one another and to the shooting of Sophie Rose, had a tendency to prove that defendant shot Sophie Rose intentionally and disprove that the shooting was either an accident or mistake. Much like a defendant whose previous robberies can be used to show that he intended to rob (*Leon, supra*, 61 Cal.4th at p. 598; *People v. Jones* (2011) 51 Cal.4th 346, 371), here, the trial court did not abuse its discretion in concluding that the act of shooting other cats was relevant to show that defendant likely acted with the same intent and not accidentally when he shot Sophie Rose. (See *People v. Cortes* (2011) 192 Cal.App.4th 873, 916 [evidence of prior fights sufficiently similar “to permit an inference that defendant did not act accidentally, inadvertently, in good faith, or in self-defense when he attacked the victim”].) Further, the shootings of domestic cats in a small geographical area near defendant’s home and in a condensed period of time also supports that defendant acted

with a common plan when he shot Sophie Rose under similar circumstances.⁷ (See *Leon, supra*, 61 Cal.4th at p. 598 [robberies occurring at similar stores, within the same neighborhood, by the same two or three people, within a short period of time].) That some uncharged conduct might have occurred *after* the charged conduct does not alter its admissibility where the other requirements are met. (*Id.* at p. 597.)

The trial court also did not err in determining Courtney's testimony at the section 402 hearing that defendant told her he shot his pit bulls behind the ear at the end of every marijuana grow season was relevant to show defendant's "mental state" or "absence of accident."⁸ Again, whether defendant acted intentionally and maliciously was placed in issue by virtue of his not guilty plea.⁹ (See *Ewoldt, supra*, 7 Cal.4th at p. 400, fn. 4.) It was also implicated by Courtney's description of the crime, as set forth in the People's motion in limine. The prosecution explained that defendant handed Courtney the pellet gun and told her to shoot at Roxy to scare the dog away. She did shoot at the dog, and defendant told her Roxy was dead and to go inside. Courtney inspected the dog and saw it was unharmed. Nonetheless, defendant proceeded to shoot Roxy multiple times in various locations around defendant's home. Courtney's trial testimony clarified that

⁷ This decision is further supported by the testimony actually elicited during trial establishing that the cats were shot with small metal projectiles, consistent with the ammunition recovered from defendant's home.

⁸ The evidence elicited at trial also supported common plan relevancy given Courtney's testimony that defendant tried to shoot Roxy behind the ear, which is the same method he used to kill his pit bulls at the end of each marijuana grow season. (See *Hendrix, supra*, 214 Cal.App.4th at p. 248 ["If the trial evidence reflects sufficient similarity—thereby enhancing the probative value of the other crimes evidence—that evidence could contribute to a conclusion that the trial court's in limine ruling based on the deficient offer of proof was harmless"].)

⁹ Furthermore, the defense attempted to negate malice by arguing to the jury that defendant had affection for Roxy and R.'s daughter, suggesting that he would therefore never hurt them.

defendant—rather than declaring the dog dead—said the dog was dying and had internal bleeding.¹⁰ Thus, defendant’s statements to Courtney had a tendency to prove that defendant harbored the same intent. In other words, whether defendant intentionally and maliciously shot his own dogs at the end of each marijuana grow season, was relevant to whether defendant acted with malice or mercy when he shot and killed Roxy. (See, e.g., *People v. Cortes*, *supra*, 192 Cal.App.4th at p. 916.)

Defendant’s reliance on *Hendrix* is misplaced. In *Hendrix*, the defendant’s *intent* in taking an action (resisting officers) was not at issue; rather, the pivotal issue as to which the prior acts purportedly were relevant was whether defendant knew that the individuals he was resisting were officers. (*Hendrix*, *supra*, 214 Cal.App.4th at pp. 240, 242.) Here, unlike in *Hendrix*, defendant’s mental state (whether he acted intentionally and maliciously or with mercy) was squarely at issue.¹¹

3. The Probative Value of the Uncharged Acts Substantially
Outweighed the Prejudice

“ ‘If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant’s intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence “is ‘substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue

¹⁰ We note this testimony because to the extent it may be questionable whether saying Roxy was “dead” fully implicated defendant’s intent in later shooting the dog, Courtney’s trial testimony that defendant said the dog was “dying and it had internal bleeding” renders any potential error on that ground harmless. (See *Hendrix*, *supra*, 214 Cal.App.4th at p. 248.) This is underscored by Courtney’s trial testimony that she believed defendant’s “internal bleeding” claim to be a pretext for killing the dog given defendant’s prior statement that he was going to kill R.’s dogs.

¹¹ Defendant cites no authority establishing that Penal Code section 597, subdivision (a), being a general intent crime, precludes the admission of evidence relevant to his mental state under the circumstances of this case.

prejudice, of confusing the issues, or of misleading the jury.’ ([] § 352.)” [Citation.]’ [Citation.]” (*Leon, supra*, 61 Cal.4th at p. 599.) Here, the trial court did not abuse its discretion in determining that the probative value of the cat and dog shootings was not substantially outweighed by any possible prejudice.

The trial court was cautious in approaching the other acts evidence. It first considered the written arguments of the parties, as well as oral argument. It excluded some of the prosecution’s proposed evidence as unduly prejudicial. Finally, it ordered a section 402 hearing on the alleged acts involving other dogs.

Of the other acts evidence that was admitted, defendant’s shooting of other cats was highly probative of whether he intentionally shot Sophie Rose. Further, it was not cumulative, as defendant did not tell his brother the circumstances under which he had shot the cat, only that he had done so. Thus, this was not a case in which the intent for the crime flows indisputably from the nature of the act complained of. (See *Ewoldt, supra*, 7 Cal.4th at p. 406 [if intent indisputable given the nature of the act, then intent evidence is cumulative].) Similarly, that these shootings occurred within the same geographical area under similar circumstances and with a similar projectile was also highly probative to establish that defendant shot Sophie Rose pursuant to a common plan.

As to defendant’s previous shooting of his pit bulls behind the ear at the end of each marijuana grow season, this evidence was probative of whether defendant acted maliciously or with mercy when he shot Roxy, another dog he knew well. And because Courtney’s anticipated testimony squarely placed in issue defendant’s mental state in performing that shooting, the trial court did not run afoul of the prohibition on intent evidence under the circumstances discussed in *Ewoldt, supra*, 7 Cal.4th at page 406.¹²

¹² Further, as borne out at trial, whether defendant would maliciously kill his niece’s beloved pet given to her following her cancer treatments underscores the noncumulative nature of the intent evidence.

Moreover, if we consider Courtney's trial testimony, it was also highly probative that defendant acted with a common plan because he attempted to shoot Roxy in the same manner that he had used to kill his own dogs, shooting them behind the ear.

We also do not find the testimony created a risk of undue prejudice, confusion or misleading of the jury. The uncharged act testimony was very brief and not particularly inflammatory when compared to the evidence concerning defendant's conduct for the charged offenses. Courtney's description of defendant repeatedly shooting his niece's dog over a period of time as it attempted to evade him¹³ was much more disturbing and inflammatory than him stating that he killed his own dogs by shooting them behind the ear or that defendant shot neighborhood cats. Nor do we think shooting multiple neighborhood cats in the same manner was appreciably more prejudicial than his shooting Sophie Rose. We also note the jury was properly instructed on the use of the prior uncharged evidence, further reducing the risk that it was misled or confused by this evidence. (*Leon, supra*, 61 Cal.4th at pp. 599-600.)

Finally, that defendant was not convicted of the uncharged bad acts does not unilaterally prohibit their admission. (See *Leon, supra*, 61 Cal.4th at pp. 594, 597 [upholding admission of evidence concerning robberies from counts dismissed following preliminary hearing].)

Having concluded the uncharged acts evidence was properly admitted, we do not reach defendant's arguments that the error in admitting this testimony was not harmless and constituted a violation of his constitutional rights.

¹³ The trial testimony actually elicited from Courtney only strengthens this analysis, as she described at length Roxy's terror, suffering, and repeated yelping over the course of defendant's assault prior to her ultimate death.

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

MAURO, Acting P. J.

MURRAY, J.